BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The trial court (through the master) decided to sell because of the apportionment theory. (R. 222 to 249)

The Supreme Court of Pennsylvania decided that the apportionment theory was not at issue. (R. 273)

Therefore, the decree of sale, being without reason, is not due process of law: for, without reason, the master would not have recommended the sale (R. 97), there being ample funds in the trust to improve the property and make it income producing (R. 147, 148, 254).

The question posed had its genesis in common sense and common law: I Blackstone's Commentaries, Sec. 135, Lewis' Edition. A note approved by Mr. Chief Justice Sharswood quotes the case of

> *Varick v. Smith & The Attorney General*, 5 Paige (N. Y.) 137 (March 17, 1835).

Chancellor Walworth wrote, page 159:

> "I had occasion in another case to say, that the right of *eminent domain* did not imply a right, in the sovereign power of the state, to take the property of one citizen and transfer it to another, where the public interest would be in no way promoted by such a transfer; *even if full compensation for such property was awarded to the owner thereof.*" * * * "But in a state which is governed by a written constitution, like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of *eminent domain* was an infringement of the spirit of the constitution; and, therefore, not within the general powers delegated by the people to the legislature." (italics ours).

The question there was whether or not the state could divert water, "not wanted for the purposes of the public," to the benefit of one citizen and to the injury of complainant. The Chancellor granted relief.

The fundamental and natural right of a person to his property is modified only when a *special reason* exists.

The learned and able Master appointed by the Orphans' Court recognized the need for such *reason.*

When the Trustee rested its case after producing only testimony as to the fair market value of the property, counsel for the present petitioners moved for a dismissal. The Master overruled the motion, stating, "* * * I think we should hear all sides of the case." (Record pp. 127a-128a). **This was the conception of the present question involved.**

It was the learned *guardian ad litem* for the minor and unborn remaindermen who advanced the *reason* for the proposed sale which was adapted by the Master (Record pp. 53a-54a, 201a, 233a-234a). This was that unless the property earned 4% there would be less for the remaindermen, and was predicated upon Section 241 of the *Restatement of the Law of Trusts,* adopted in Pennsylvania in

> *Nirdlinger's Estate* (No. 2), 327 Pa. 171, 193 A. 30.

We took the position that this view was erroneous, first because apportionment between life tenants and remaindermen was a future question of distribution, and secondly that apportionment, if any, was discretionary:

> *Spear's Estate,* 333 Pa. 199, 201; 3 A. 2d 789.
> *John Frederick Lewis, Jr. vs. Commissioner,* 1 Tax Court 449 (Jan. 12, 1943) No. 57.

The Supreme Court of Pennsylvania agreed with us:

> "A portion of appellants' argument is devoted to

a discussion of the rights of the life tenants to reimbursement on account of the deficits occurring when the real estate was operated at a loss: *Nirdlinger's Estate* (No. 2) 327 Pa. 171, 193 A. 30. *That problem is not before the court at the present time."* Cope's Appeal, 347 Pa. 221, 32 A. 2d 23. (R. p. 271 *et seq.*)

The property is as valuable to us as it is to the buyer, and funds should be spent on its improvement:

Longbotham's Estate, 346 Pa. 94; 29 A. 2 482,

and it should not be sold until after the war (R. 95, 96).

When the Supreme Court of Pennsylvania ruled out the Master's reason it left *only the market price* to support the sale. We respectfully submit that the learned Master considered only two things: Should it be sold, and secondly, is the price fair? His Report and recommendation was adopted by the Orphans' Court without elaboration.

The Pennsylvania Courts took jurisdiction under the *Revised Price Act* of June 7, 1917, P. L. 388, as amended (20 Purdon's Statutes 1561 et seq.), the pertinent portion of which is appended hereto; but we do not feel that the Legislature of Pennsylvania intended to violate the provisions of the first section of the 14th Amendment of the Constitution of the United States. The Legislature provides for sales *only on special grounds* (see proviso). There is *always* a market price.

"* * * The power of the legislature to authorize the sale of *property held in trust* or of property in which there are interests in remainder, without the consent of the cestui que trust or remainderman, has been sustained by some authorities, but by others has been denied, as effecting a taking of private property without due process. *However, in the absence of special grounds*, such as the protection of persons under disabilities or necessity for the purpose of doing jus-

tice, *a legislative act authorizing the property of one person to be sold and the title thus vested in another is void as a taking without due process of law.*"

Constitutional Law, 16 C. J. S. Sec. 647 **b**, page 1337. (italics ours)

The Legislature provided for sales upon *special grounds*. The Master wrote, dismissing Exception No. 21 (Record p. 249a):

"This may well be a correct statement of facts, but it would not alter the Master's opinion *or the ground upon which he bases his Report.*"

FEDERAL QUESTION FIRST RAISED BY DECISION OF SUPREME COURT OF PENNSYLVANIA.

But the only *ground* given by the Supreme Court of Pennsylvania is that the price is the best obtainable for the property, considering its age and condition, on the present market. But that was not *why* the Master recommended the sale.

Here, *for the first time,* a constitutional question is presented. *Johnson v. Brauch,* 68 N. W. 173, 175; 9 S. D. 116 (Fuller, J.):

"When the deed to Edward R. Houlton, under which the Johnsons claimed title, was executed and delivered, and when the special statute was passed, purporting to authorize Jacob Brauch, as the *administrator* of the Estate of Anna Brauch, deceased, to 'sell and convey either at public or private sale' the property in dispute, there were no *debts or claims* of any kind against the estate, nor is there anything to indicate that the *heirs* and indefeasible owners of the property would derive any *benefit* from the transaction. Apparently, the only object sought to be attained, was to enable an administrator to convert property, owned jointly by himself and his children,

but two of whom were under disability, into money for the sole purpose of distribution. Special statutes authorizing a guardian to sell the estate of a decedent for the maintenance and education of minor heirs, or the payment of debts, subject to which they obtained title at the death of an ancestor, and with which the property is still burdened, have been sustained *for the reason that the rights of creditors are paramount, and upon the theory that the legislature should, when necessary, protect the weak, and promote the welfare of persons incapacitated by some legal disability* from disposing of their own estate. No *necessity* appears to have existed for the sale of the premises, and obviously the legislative act invades the functions of the judiciary. In contravention of the *federal constitution* and the organic law then in force in this jurisdiction, tenants in common and the owners of private property were, *without their consent,* and in the absence of notice, or an opportunity to be heard, divested of their estate without due process of law, and the act relied upon to justify the transaction is therefore unconstitutional and void. *Brenham v. Story,* 39 Cal. 179; *Wilkinson v. Leland,* 2 Pet. 627; *Powers v. Bergen,* 6. N. Y. 358; *Lane v. Dorman,* 3 Scam. 238; *Sohier v. Hospital,* 3 Cush. 483; 3 *Washb. Real Prop.* 227. The language of Mr. Justice Story in *Wilkinson v. Leland,* supra, is, '*We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state of the Union.*'" (italics ours)

"Judge Thompson said, in *Dash v. van Kleeck,* 7 Johns. 477: 'It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of an individual, without his consent, and give it to another.'" *People v. O'Brien,* 18 N. E. 692, 707; 111 N. Y. 1.

The *Price Act* was held constitutional by the Supreme Court of Pennsylvania in:

Smith's Estate, 207 Pa. 604; 57 A. 37 (1904),

where *substantial reasons in addition to the fair market value* were advanced in support of the sale. In the *Smith* case the income to the life tenants would be "largely increased" by the investment of the proceeds. No such hope is present here. There the tax assessor had not complied "with his official oath" and assessed the property at its market value; proper assessment "in view of the large mortgage against the property, *would be disastrous.*" Here the property is clear of encumbrance, and assessed at its *fair value*, nearly double the proposed sale price. There a "present inflated condition" of the market was recognized. Today we are engaged in the greatest war in history; and retail merchandising is greatly restricted. But the fact that in the *Smith* case *mere increase in assessment to the market value would be disastrous in view of the large mortgage* certainly is sufficient reason for the sale. Increase in assessment, followed by insufficient income to pay taxes *and mortgage interest* would have wiped out the remaindermen.

In the case at bar, mere reduction of the assessment *to the proposed sale price* would result in a greater income at present rentals than would investment of the proceeds.

It is not a question of judgment. We do not ask that the sufficiency of the reasons for the sale be inquired into. *We submit that no reason has been shown.* With the Master's sole reason out of the way, there is nothing but market value.

QUESTION OF NATIONAL IMPORTANCE, VITAL TO ALL TRUST BENEFICIARIES.

This question is of great national importance, because many beneficiaries of trust estates, impoverished by lack of income during the depression, under the ruling of the

Supreme Court of Pennsylvania are subjected to having the corpus wiped out by sale on a wartime restricted market while they *stand by helpless without funds to bid against the speculators.* A vested alienable interest is partitionable. If we had such an interest we could buy, and give a 50% mortgage to pay the co-owners.

The Trustee under the Deed of Trust has power of sale if it wants to assume that responsibility (Record p. 31a), instead of passing the burden on to the Courts. Reflection shows, that because the owners of the other half interest in the trust advocate the sale, is no argument for the sale of the half owned by your petitioners. Such disagreements are one of the inherent disadvantages of co-ownership and applies both ways. The disadvantages of co-ownership are offset by the ability such ownership gives to own a larger item of property. The Trust in the instant case was created *voluntarily* by the two life tenants, and conveyed property rights vested in remaindermen. The disadvantages were known to the settlors. If this trust corpus had been acquired by inheritance, a party desiring to sell might have partition proceedings, and the one opposing the sale could have the property awarded to him as a portion of his purpart. But here the settlors created vested interests in remainder, and such interests cannot be cut short by a sale against their wishes merely because the price is the fair market value. *There must be special grounds for selling first established, then, the propriety of selling having been determined, the fair market value must be obtained.* The alternative is not due process, **but Goering's method.**

Respectfully submitted,

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July 26, 1943.

Revised Price Act of 1917, P. L. 388, as amended by the Act of May 12, 1939, P. L. 126.

Section 1. Be it enacted, &c., That the orphans' court, (1) in all cases where real estate, or a ground-rent issuing thereout, shall be or shall have been acquired by descent or last will, partly by deed and partly by descent or last will, or by purchase by a trustee, executor, or guardian, and (2) concurrently with the court of common pleas in all cases where real estate, or a ground-rent issuing thereout, shall be or shall have been acquired by deed or last will, partly by deed and partly by last will, or by purchase by a trustee of a trust inter vivos subject to the jurisdiction of the orphans' court, and in all other cases, the court of common pleas of each county of this Commonwealth, shall have jurisdiction with respect to real estate situate within the county, and in the cases hereinafter specified, to authorize or confirm:

(a) The sale, mortgaging, conveying on ground-rent and leasing thereof, or the extinguishment or assignment of ground-rents issuing thereout;

(b) The amicable partition and exchange thereof;

(c) The squaring and adjusting of lines between adjoining owners;

(d) The consolidation and combination of mining lands with other adjoining mining lands, so that they shall form one tract, and the leasing thereof in such manner that the several persons interested therein shall be seised of undivided interests in the whole, proportionate to their several undivided interests before such combination and consolidation; the rents or royalties received under the lease to be apportioned among them in like proportions;

(e) The joining by owners of undivided interests in making and taking conveyances, in order to change, in

part or in whole, the route or location of any right of way or passage existing over and upon adjoining or other lands;

(f) The subdivision of the premises so as to command the highest price or greatest rents; and for such purpose, where the premises shall admit of or require it, the laying out and the dedication of roads, streets, and alleys, or the vacating of such as shall not have been paid for or received into actual use by the public, if found to be inconvenient and to make an unprofitable division of the property;

Provided, That such court shall be of the opinion that such decree will be to the interest and advantage of all those interested therein, and without prejudice to any trust, charity, or purpose for which the real estate or ground-rent shall be held, and without the violation of any law which may confer an immunity or exemption from sale or alienation.